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IN THE

Supreme Court of the United States

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner,*

vs.

RAYMOND L. MCDANIEL, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner*,

vs.

RAYMOND L. McDANIEL, *Respondent*.

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APPENDIX A

The Complaint, filed June 23, 1969 in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, is as follows:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

No. 69-10412

RAYMOND L. MCDANIEL, *Plaintiff,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

COMPLAINT

Comes now the Plaintiff, RAYMOND L. MCDANIEL, by and through his undersigned attorneys, and sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and alleges:

COUNT I

1. This is a civil action arising under §§ 51-60 Title 45 U.S.C.

2. At all times material hereto the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, is a Virginia corporation maintaining its principal place of business in the State of Florida. Said Defendant owns and operates a common carrier railroad system engaged in interstate commerce and said Defendant does business in Dade County, Florida.

3. At all times material hereto, the Plaintiff, RAYMOND L. MCDANIEL, was an employee of the Defendant railroad or its predecessor corporation, Atlantic Coast Line Railroad Company, and said Plaintiff was working at his regular employment in the furtherance of interstate commerce.

4. On or about September 16, 1967 at approximately 11:15 p.m., the Plaintiff, RAYMOND L. MCDANIEL, was employed by the Defendant as a switchman and was working in and about the Defendant's railroad yard in Waycross, Georgia, switching railroad cars. At said time and place, the Plaintiff was riding upon a boxcar in the performance of his duties when, as a result of Defendant's negligence, the boxcar upon which he was riding was shoved against another railroad car with such violence as to knock the plaintiff to the ground causing serious personal injury as hereinafter alleged.

5. At the aforesaid time and place the Defendant railroad was negligent in the following acts of omission or commission:

a) In furnishing the Plaintiff a dangerous and unsafe place to work.

b) In failing to provide the Plaintiff with a reasonably safe place to work.

c) In negligently operating and controlling the car upon which Plaintiff was riding at the time of the subject accident.

d) In negligently failing to give proper and adequate signals and warnings of switching operations.

e) In operating the cut of cars upon which Plaintiff was riding at an excessive rate of speed.

6. As a result of the negligence of the Defendant railroad

aforesaid, Plaintiff was severely injured and said injuries include but are not limited to injuries to the neck, back and hip. Said injuries are continuing and permanent in nature.

7. As a result of the aforesaid negligence of the Defendant railroad, the Plaintiff has in the past and will in the future suffer great mental and physical pain and suffering, shame and humiliation and personal inconvenience; he has been obliged to undergo medical treatment and will be required to continue such care in the future; his earning capacity has been diminished and he has sustained a loss of earnings and that he has been rendered less able to lead a normal life.

(COUNT II OMITTED)

WHEREFORE, the Plaintiff, RAYMOND L. MCDANIEL, sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation and seeks judgment within the jurisdictional limits of this Court, to-wit: in excess of Five Thousand Dollars ($5,000.00) exclusive of costs and further demands trial by jury of all issues triable as of right by a jury.

(Counsel's signature omitted)

APPENDIX B

The Order, filed January 27, 1970, of the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, transferring cause to the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, is as follows:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

No. 69-10412

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

ORDER TRANSFERRING CAUSE

THIS CAUSE came on for hearing upon the Plaintiff's Motion for Rehearing. The Court having heard the argument of counsel, reviewed the appropriate authorities and being otherwise fully advised, it is

ORDERED AND ADJUDGED, that Plaintiff's Motion for Rehearing be and hereby is granted and this Court's Order of September 29, 1969, dismissing this cause, be and hereby is set aside and rendered naught. It is further

ORDERED AND ADJUDGED, *sua sponte*, that this cause be and hereby is transferred to the Circuit Court of the Fourth Judicial Circuit of Florida in and for Duval County and the Clerk of this Court is instructed to perform all duties necessary to

transfer this cause and the file herein to the Clerk of said Fourth Judicial Circuit of Florida.

DONE AND ORDERED this 12th day of January, 1970 in Chambers at the Dade County Courthouse, Miami, Florida.

/s/ James Lawrence King
CIRCUIT JUDGE

* * *

APPENDIX C

The Amended Answer, filed February 25, 1970, is as follows:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

AMENDED ANSWER

The Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, by and through its undersigned attorneys, for its Amended Answer to the Complaint filed by the Plaintiff herein, says:

FIRST DEFENSE

The Defendant admits that it owns and operates a com-

mon carrier railroad system engaged in interstate commerce, but it specifically denies each and every allegation contained in said complaint not herein specifically admitted.

SECOND DEFENSE

The Defendant denies the alleged negligence and consequences thereof.

THIRD DEFENSE

The Defendant denies that it violated the Safety Appliance Act and specifically denies all allegations of violations of said act.

FOURTH DEFENSE

As to the Plaintiffs claim under the Federal Employers' Liability Act, the Defendant alleges that at the time and place of the alleged accident which is the subject matter of the complaint, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted wholly in his injuries, Plaintiff is barred of recovery, and to the extent that his negligence resulted in part in his injuries, Plaintiff's damages are diminished in accordance with the degree of negligence attributable to him. In making such affirmative averments and allegations this Defendant does not thereby admit any negligence whatsoever on its part or that Plaintiff was in any way injured as claimed.

(Counsel's signature omitted)

APPENDIX D

Excerpts of trial testimony of Raymond L. McDaniel, Plaintiff, are as follows:

EXCERPTS OF TRIAL TESTIMONY OF RAYMOND L. McDANIEL, PLAINTIFF

MR. BECKHAM

"Q What was your particular job as a member of that crew?

A I was supposed to climb up on the end of the car and tie the handbrake and stop the cars when they got by the engine, far enough to clear, so we could come back and get around them with the engine and shove them down and spot them at the platform."

"Q Did you know at the time that you were riding the cars which track that switchman was actually going to push them into?

A I did not; no, sir." . . .

"Q When did you find out what track the cars were going into?

A Just a few seconds before they hit." . . .

"Q How many tracks were there available to the switchman at that point, to put you in?

A There was three tracks, but I was supposed to have gone in track 3." . . .

"Q All right. Now, where were you when you first learned or realized which track you were going into?

A I must have been about, maybe a quarter length or a little further from those cars that I hit. I knew I was supposed to go in track 3.

Q What track did you actually go into?

A I went in track 1."

MR. GABEL

"Q Mr. McDaniel, as far as this 1967 incident, as I understand it you intended to take the three cars from the rear of the 94 or 96, whatever it was at that time, the same train, and spot them at the freight house, is that correct?

A That's correct." . . .

"Q Now, I believe you said that each of the freight cars had a handbrake; is that true?

A Yes.

Q And would it be safe to say that your function was to use the brake and slow the cars down and stop them by the freight house?

A That was the job that I was supposed to do; yes, sir, after they cleared the switch that Alvin Gordon threw." . . .

"Q And in this case you knew that track 3 and track 2 were not clear; did you not know that?

A I knew that after I hit.

Q I refer to your deposition which was taken on May 5, 1970 at which time you were under oath and your attorney was there, page 46, and ask you if you gave this answer to this question:

'Question: Where were you heading and what were you going to do?

'Answer: We had to come down this track 1, which is the main line, and somewhere in this vicinity here, the foreman was supposed to have pulled a pin and let the engine go. In this special case, track 3 wasn't clear and track 2 wasn't clear, and earlier in the evening, I had put three piggy-back cars in track 1 and there was approximately one car length in the clear.

'So, Mr. Gordon, he got off and was supposed to line the switch. Well, there's a B&WY switch right here too.'

Q Did you not give that answer to that question?

A Can I clear that up?

Q I am just asking you if you gave that answer to that question.

A That is what I said; yes, sir.

Q Well, let me ask the questions, and you tell me if you said it. If your lawyer wants to ask you some more, he can.

But at that time you were under oath and you said that; is that correct?

A At that time, if that is on that paper, that is what I said." . . .

"Q And you also knew that track number 1 was the only place the switchman could send you, because that's where you had the most room; is that true?

A Ask that question again, now.

Q That track number 1, that you knew track number 1

was the only place that the switchman could send you –

A Did I say it was the only –

Q – because that was where you had the most room?

A The cars in track 1 were approximately the same distance that the cars in track 2 were, but the cars in track 2 were not clear of track 3 where I was supposed to have gone.

Q The question I asked you was did not you know that track number 1 was the only place the switchman could send you?

A No, sir.

Q I refer to your deposition again on page 49.

A I didn't understand the question.

Q I ask you if you gave this answer to this question:

'Question: Well, you said you had put some piggyback cars in track 1?

'Answer: In track 1. That was where you had the most room. That's the only place that he could send them where he could put them without tearing the side off the car on these cars that was in 2 here."

Q Did you not give that answer to that question; just yes or no.

A It sounds like I did." . . .

"Q And I believe you said that your function on the cut of cars was to control the movement of the cars as far as braking or stopping the cars; is that true?

A That's right."

"Q As you were coming into the track, you were two full car lengths from the lead end of the cars; in other words, you were on the back of the second boxcar?

A That's right.

Q And, therefore, your visibility was limited in front; was it not?

A It was, in the direction we were going."

* * *

APPENDIX E

The Defendant's Requested Instruction No. 5, is as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

"No. 5. Contributory negligence is the failure on the part of a person who has been injured to exercise reasonable and ordinary care for his own safety under the circumstances, which failure to exercise such due care contributed to the accident or injury sustained. If the Plaintiff's contributory negligence played any part, no matter how small, in actually bringing about or causing the injury complained of, such contributory negligence of the employee 'shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee.'"

APPENDIX F

The Defendant's Requested Instruction No. 11, is as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 11

"No. 11. You should consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation."

* * *

APPENDIX G

Excerpts from Colloquy Between the Court and Counsel at Charge Conference, is as follows:

EXCERPTS FROM COLLOQUY BETWEEN THE COURT AND COUNSEL AT CHARGE CONFERENCE

"MR. BECKHAM: Before we get into the charges, the Plaintiff, at the conclusion of all the evidence moves the Court for a directed verdict on the issue of liability under both counts one and two, and further moves the Court for a directed verdict on the issue of contributory negligence. . .

THE COURT: Now, off the record just a moment.

(Discussion off the record)

THE COURT: Now, the motion will be denied.

MR. BECKHAM: Is Your Honor of the opinion that there is any basis for the submission of the issue of contributory negligence? Number one, there is no contributory negligence defense on the grabiron.

MR. GABEL: Right.

MR. BECKHAM: So I move also on the issue of contributory negligence with reference to the other count where he was riding the brake step.

THE COURT: All right. Off the record, now.

(Discussion off the record)

THE COURT: I will strike the defense of contributory negligence as to the first accident.

MR. BECKHAM: Right. That is the only one they alleged it to.

THE COURT: There is no evidence of contributory negligence at all as far as the Court can see.

Now, off the record.

(Discussion off the record)

. . . MR. BECKHAM: And I do again request the Court to give the aggravation of the previously existing dormant condition charge from the standard charges.

THE COURT: All right. . .

THE COURT: Aggravation of a previously existing – I've got it. We've got the standard charge.

. . . MR. GABEL: Your Honor, my number 11, I ask for a modification of that.

THE COURT: Your number 11? . . .

MR. GABEL: He's got an aggravation –

THE COURT: I will have the aggravation.

MR. BECKHAM: 6.2, I believe it is. It doesn't show there, but I think – look at 6.2. . . .

THE COURT: Yes, aggravation, I'll give that, and you're doing what, now?

MR. GABEL: I found an FELA case that has it about the same, but that last sentence I thought I would request be added.

THE COURT: 'Plaintiff is not entitled to recover damages which would have resulted from his previous condition –' (reading.)

MR. BECKHAM: This tells them that they should apportion it if they can.

THE COURT: I'm going to give this (indicating). Let's go through yours now . . .

MR. BECKHAM: Five is out?

THE COURT: Five is out. . .

MR. BECKHAM: You have already denied number 11 in favor of the standard charge.

THE COURT: Yes. I said I'd give the general. . .

MR. GABEL: I'd just like to object.

THE COURT: You object to that?

MR. GABEL: Yes.

MR. BECKHAM: To what, reading the statute?

MR. GABEL: On the amendment, the amendment part there, and number – his requested instructions number two and five.

THE COURT: All right.

MR. GABEL: And the denial of all my instructions.

THE COURT: All noted in the record."

* * *

APPENDIX H

The Florida Standard Jury Instruction 6.2b as Requested by Plaintiff and Given to the Jury, is as follows:

FLORIDA STANDARD JURY INSTRUCTION 6.2b AS REQUESTED BY PLAINTIFF AND GIVEN TO THE JURY

"Also, you should consider any aggravation of an existing disease or physical defect or activation of any such latent condition resulting from such injury. If you find there was such an aggravation, you should determine if you can what portion of the Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed part from the injury, you should consider and make allowance in your verdict for the entire condition."

APPENDIX I

The Verdict of Jury, filed July 1, 1970, is as follows:

VERDICT

We, the Jury, find for the Plaintiff, RAYMOND L. MCDANIEL, and assess his damages at $67,500.00.

SO SAY WE ALL.

(Foreman's signature omitted)

* * *

APPENDIX J

The Verdict and Final Judgment, filed July 1, 1970, in the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, is as follows:

VERDICT AND FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

This action was tried and the Jury rendered the following Verdict:

VERDICT FOR PLAINTIFF

We, the Jury, find for the plaintiff, RAYMOND L. MCDANIEL, and assess his damages in the amount of $67,500.00.

So say we all.

Dated: July 1, 1970.

Jacksonville, Florida.

(Foreman's signature omitted)

Pursuant to the Verdict rendered in this action

IT IS ADJUDGED that Plaintiff, RAYMOND L. MCDANIEL, recover from Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, the sum of $67,500.00, with his cost, in the sum of $386.50, for which let execution issue.

/s/ Marion W. Gooding
Circuit Judge

APPENDIX K

The Motion for Judgment in Accordance with Motion for Directed Verdict or, in the Alternative, Motion for New Trial or, in the Alternative, for a Remittitur, filed July 13, 1970, is as follows:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A REMITTITUR

Pursuant to the Florida Rules of Civil Procedure, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, by and through its assigned attorneys, moves the Court to set aside the verdict entered in the above-entitled action on July 1, 1970, and the judgment entered thereon, and to enter judgment in favor of the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, in accordance with the Motion for Directed Verdict made at the close of Plaintiff's case and renewed by Defendant at the close of all the testimony herein on the following grounds:

(a) There was no evidence of negligence on the part of

the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation.

(b) There was no evidence that the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, was guilty of negligence which was a proximate cause of the Plaintiff's injury and damage.

(c) There was no evidence of a violation of the Boiler Inspection Act which was a proximate cause of the Plaintiff's injury and damage.

(d) The evidence affirmatively showed that the sole proximate cause of Plaintiff's condition and damage was the Plaintiff's mental and emotional state and the Plaintiff's failure to seek medical attention for said condition following the alleged incident of September 6, 1967.

(e) There was no evidence adduced that was legally sufficient to establish that said Plaintiff was within the coverage of the Boiler Inspection Act and Safety Appliance Act.

WHERFFORE, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, respectfully submits that judgment should be entered in its favor notwithstanding the aforementioned verdict.

In the alternative, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, moves the verdict of the jury in the above-entitled cause be set aside and that the judgment entered on said verdict be vacated and set aside and that a new trial be granted to the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, for the following reasons:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. There is no evidence that the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, was guilty of negligence.

6. There was no evidence that the Defendant, SEABOARD COAST LINE RAILROAD, a foreign corporation, was guilty of a violation of the Boiler Inspection Act or Safety Appliance Act.

7. The evidence affirmatively shows that the sole proximate cause of the Plaintiff's condition and damage was the Plaintiff's own negligence in failing to seek medical attention for his mental and emotional problems following the alleged incident of September 6, 1967.

8. The Court erred in denying Defendant's Motion to direct a verdict in its favor at the close of Plaintiff's case.

9. The Court erred in denying Defendant's Motion to direct a verdict in its favor at the close of all the evidence.

10. There is no sufficient or substantial evidence pending to support the amount of the jury's verdict.

11. The verdict is excessive and entirely speculative and appears to have been given under the influence of passion, prejudice, bias and sympathy.

12. It affirmatively appears from the verdict that the jury disregarded their oaths as jurors and arbitrarily and capriciously refused to render a verdict on the testimony

and law given by the Court and rendered a verdict based solely on sympathy, passion and prejudice.

13. The Court erred in failing to grant Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence and at the conclusion of all of the evidence where all of the evidence affirmatively showed that Plaintiff was suffering from mental and emotional problems which were the cause of his condition and that said condition was caused by said problems and not related to Plaintiff's employment.

14. The evidence requires a finding that if Plaintiff's alleged injury and damage of September 6, 1967 was due to negligence, he was injured solely by reason of his own negligence.

15. The Court erred in directing a verdict in Plaintiff's favor at the close of all of the evidence as to Defendant's Fourth Defense as follows:

> "As to the Plaintiff's claim under the Federal Employers' Liability Act, the Defendant alleges that at the time and place of the alleged accident which is the subject matter of the complaint, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted wholly in his injuries, Plaintiff is barred of recovery, and to the extent that his negligence resulted in part in his injuries, Plaintiff's damages are diminished in accordance with the degree of negligence attributable to him."

16. The Court erred in giving to the jury Plaintiff's Requested Instruction No. 2 as follows:

> "No. 2. It is the duty of the railroad to use ordinary

care and prudence in furnishing to its employee a reasonably safe place in which to work and to use all reasonable precautions to maintain and keep such place in a reasonably safe condition, commensurate with the amount of danger which the railroad knew, or, in the exercise of due care, should have known, existed in the places where its employees must work. This duty is both continuing and non-delegable."

17. The Court erred in giving the jury Plaintiff's Requested Instruction No. 5 as follows:

"No. 5. Negligence is legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially in whole or in part to producing such injury, so that it can reasonably be said that, but for the negligence, the injury would not have occurred."

18. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 3 as follows:

"No. 3. In determining whether or not the Defendant was negligent in any way of the respects alleged in the Complaint, you should consider the conduct of the Defendant in the light of the circumstances at the time and place of Mr. McDaniel's accident, and not in the light of experiences gained in and because the accident, or in the light of a course of conduct which the accident and subsequent reflections on it may cause you to feel would have avoided injury to the Plaintiff had it been pursued by the Defendant. For, to use a popular but accurate expression, an issue of negligence is to be determined by foresight used at the time of the events inquired about; not by hindsight brought into play later."

19. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 4 as follows:

> "No. 4. The mere happening of an accident or injury to an employee while he is engaged in operations for the railroad will not warrant a recovery. The railroad is not required to furnish the best, the safest, or the newest applicances or methods of operation. It is not required to adopt extraordinary or unusual safeguards against risks and dangers. The limit of the duty of the railroad to its employees under the Federal Employers' Liability Act is to exercise ordinary care to supply a reasonably safe place to work. And in this case no breach of duty, if any, on the part of the Defendant could be considered by you unless you find by a legal preponderance of the evidence that the Defendant was negligent, that is, failed to exercise ordinary care, in one or more of the particulars charged in Plaintiff's Complaint and that such negligence, if any, proximately caused in whole or in part Plaintiff's injury, if any."

20. The Court erred in refusing to give the jury the Defendant's Requested Instruction No. 5 as follows:

> "No. 5. Contributory negligence is the failure on the part of a person who has been injured to exercise reasonable and ordinary care for his own safety under the circumstances, which failure to exercise such due care contributed to the accident or injury sustained. If the Plaintiff's contributory negligence played any part, no matter how small, in actually bringing about or causing the injury complained of, such contributory negligence of the employee shall not bar a recovery, but the damage shall be diminished . . . in

proportion to the amount of negligence attributable to such employee."

21. The Court erred in refusing to give to the jury the Defendant's Requesed Instruction No. 6 as follows:

"No. 6. I charge you, Gentlemen of the Jury, that it is not actionable negligence that an employer railroad fails to anticipate lack of care on the part of an employee."

22. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 7 as follows:

"No. 7. Ordinary prudence requires every person to use his faculties of hearing and sight (and common sense) for his own protection and to avoid places of danger. And he is conclusively presumed to know which he would have known, had he made ordinary use of his senses. Thus, if one voluntarily places himself in or remains in a position which he knows, or by the exercise of ordinary care should know, is dangerous, then his conduct may be found by you to be negligence and if such negligence, if any, is the sole proximate cause of the accident and resulting injuries, then he cannot recover."

23. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 8 as follows:

"No. 8. I charge you, Gentlemen of the Jury, that if you should find from the evidence that the Plaintiff's injury and damage, if any, was occasioned by a pure accident unmixed with any negligence on the part of the Defendant, if any, then and in such event the Plaintiff would not be entitled to recover in this

cause, and it would be your duty to return a verdict for the Defendant."

24. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 10 as follows:

"No. 10. 5.1 *Legal Cause.* Negligence is a legal cause of injury or damage if it directly and in natural and continuous sequence produces or contributes or contributes substantially to producing such injury or damage, so that it can reasonably be said that, but for the negligence, the injury or damage would not have occurred. Such injury or damage must be reasonably foreseeable in the light of attending circumstances."

25. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 11 as follows:

"No. 11. 6.2 *Aggravation or activation of disease or defect:* Any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation."

26. The Court erred in refusing to sustain Defendant's objection during closing argument by Plaintiff's counsel to the jury in which reference was made to the work life expectancy of Plaintiff when no evidence as to such expectancy had been presented to the jury.

WHEREFORE, the Defendant, SEABOARD COAST LINE RAIL-

ROAD COMPANY, a foreign corporation, respectfully submits that in the event judgment is not entered by the Court in its favor notwithstanding the verdict, that a new trial should be granted to this Defendant.

Further in the alternative, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, moves that a Remittitur be ordered for the following reasons:

(i) The verdict is excessive and appears to have been given under the influence of passion, prejudice, bias and sympathy.

(ii) It affirmatively appears from the verdict that the jury disregarded their oath as jurors and arbitrarily and capriciously refused to render a verdict on the testimony and law given by the Court and rendered a verdict based solely on sympathy, passion and prejudice.

(iii) The evidence affirmatively showed that the Plaintiff was suffering from mental and emotional problems which were the cause of his condition and that said condition was caused by said problems and not related to Plaintiff's employment.

(iv) The evidence affirmatively showed that the cause of Plaintiff's condition and damage was Plaintiff's own negligence, in whole or in part, in failing to seek medical attention for his mental and emotional problems following the alleged incident of September 6, 1967.

(v) The Court, in directing a verdict in Plaintiff's favor at the close of all of the evidence as to Defendant's defense of contributory negligence, precluded the jury from considering in its verdict the contributory negligence of the Plaintiff and Plaintiff's damages should have been diminished in accordance with the degree of negligence attributable to him.

WHEREFORE, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, respectfully submits that a Remittitur should be ordered in the event judgment is not entered by the Court in its favor notwithstanding the verdict or in the event a new trial is not granted to this Defendant.

(Counsel's signature and acknowledgement omitted)

* * *

APPENDIX L

The Order, filed July 20, 1970, denying Defendant's Motions, is as follows:

ORDER

This cause came on to be heard on Defendant's motion for judgment in accordance with motion for directed verdict or, in the alternative, motion for new trial or, in the alternative, for a remittitur, and the Court having heard argument of counsel and being advised in the premises, it is thereupon

ADJUDGED that said motion for judgment in accordance with motion for directed verdict or, in the alternative, motion for new trial or, in the alternative, for a remittitur be, and the same is, hereby denied.

DONE AND ORDERED at Jacksonville, Florida, this 20th day of July, 1970.

/s/ Marion W. Gooding
CIRCUIT JUDGE

APPENDIX M

The Opinion and Judgment of the District Court of Appeal, First District, State of Florida, filed October 21, 1971, and reported at 254 So.2d 15, affirming Final Judgment set forth in Appendix J, is as follows:

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA, JULY TERM, A.D. 1971

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NO. 0-48

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Appellant,

v.

RAYMOND L. MCDANIEL, *Appellee.*

An Appeal from the Circuit Court for Duval County.

Marion W. Gooding, Judge.

Kurz, Toole, Taylor, Moseley & Gabel, for Appellant.

Horton & Schwartz and Beckham & McAliley, for Appellee.

RAWLS, J.

Appellant Railroad appeals from an adverse judgment in favor of appellee McDaniel, and contends that the trial court erred in: 1. Directing a verdict as to the question of plain-

tiff's contributory negligence; and 2. Refusing to give defendant's requested instruction as to aggravation and giving Florida Standard Jury Instruction 6.2.b.

Two accidents are involved in this case. Plaintiff McDaniel filed suit pursuant to the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60, and the Boiler Inspection Act and Safety Appliance Act, 45 U.S.C.A. §§ 1-51. The Railroad denied the negligence alleged in the complaint and affirmatively alleged that plaintiff was guilty of contributory negligence as to his claim under the Federal Employers' Liability Act. At the close of all the evidence the trial court directed a verdict in plaintiff's favor as to the defense of contributory negligence.

On September 6, 1967, McDaniel, a veteran switchman, was assigned to a crew to uncouple three freight cars. A so-called "flying switch" was involved in the movement of the freight cars.(1) Two attempts to uncouple the cars to be switched failed. On the third attempt, the engine was able to "run away" from the cars uncoupled which were accidentally cut onto the wrong siding, resulting in the "cut cars" colliding with other cars on the sidetrack. As a consequence of the collision, McDaniel fell from the top of the car he was riding and was injured.

The second accident occurred on July 31, 1968. On that occasion the grab iron, attached to the locomotive which plaintiff was attempting to board, broke loose resulting in further injuries to plaintiff.

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(1) A flying switch was described by McDaniel as follows:
"... you have the cars behind you and you want them on the other side of you, so you pull them at a speed fast enough that you estimate they will go where you want them to go, you get up to that speed, you uncouple them, run off with the engine and get away from them, and you get on the other side of the switch and the man handling the switch lines the switch and diverts the cars to where you want them to go."

Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee-plaintiff's contributory negligence. In support of this argument, in its brief appellant propounds the question: "What evidence is considered 'sufficient' to support a recovery against the railroad under the FELA?", and proceeds to the conclusion that only a "slight" showing of contributory negligence must be adduced in order to make the same a jury issue. In short, appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized in evaluating evidence of contributory negligence on the part of the injured employee.

In a legion of cases this jurisdiction has held that the question of contributory negligence is normally one that should be resolved by a jury under the proper instructions. However, there must be some proof by the defendant of negligence on the part of the plaintiff to support a charge of contributory negligence. Evidence of contributory negligence is somewhat analogous to the euphuism "a little bit pregnant." Either there is evidence of some negligence on the part of the injured party which contributed to the accident, or such is not adduced. A review of this record fails to disclose any evidentiary basis for such a charge, thus the trial judge was eminently correct in refusing to give same.

Appellant next contends that the trial court misled the jury on the question of damages by giving Standard Jury Instruction 6.2.b. which deals with the subject of aggravation of pre-existing injury. In its brief, appellant acknowledges that the jury instruction, which was adopted from the

case of C. F. Hamblen, Inc. v. Owens, 172 So. 694 (Fla. 1937), is the Florida law; however, it contends that pursuant to the holding in Florida East Coast Railway Company v. Pollack, 154 So. 2d 346 (Fla. DCA 3d, 1963), "No state statute, law or other enactment can enlarge or contract the operation of the act and the rights and obligations arising thereunder." Appellant, citing Shupe v. New York Central System, 339 F 2d 998 (7th Cir. 1965), concludes that plaintiff's damages were limited to those which he could prove were proximately caused by defendant's negligence. We do not agree. We hold that the instruction fairly states the applicable law not only of this jurisdiction but the construction of the FELA by federal authorities. Butler v. New York Central R. Co., 253 F. 2d 281 (7th Cir. 1958); and Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99 (Fla. DCA 1st, 1969).

The judgment appealed is affirmed.

CARROLL, DONALD, Acting Chief Judge, and MASON, ERNEST E., Associate Judge, CONCUR.

APPENDIX N

The Order of the District Court of Appeal, First District, filed November 18, 1971, denying Petition for Rehearing, is as follows:

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT,
STATE OF FLORIDA, JULY TERM, A.D. 1971

CASE No. 0-48

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Appellant,

v.

RAYMOND L. McDANIEL, *Appellee.*

ORDER

Petition for rehearing, filed November 2, 1971, having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Donald K. Carroll, Acting Chief Judge, and Seal of the Court this 18th day of November, A.D., 1971.

/s/ Raymond E. Rhodes
Clerk

A True Copy

ATTEST:

/s/ Raymond E. Rhodes
Cler, First District Court of Appeal
Tallahassee, Florida

APPENDIX O

The Order of the Supreme Court of Florida, dated March 24, 1972, and reported at 260 So.2d 517, denying the Petition for Writ of Certiorari to review the Judgment set forth in Appendix M, is as follows:

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1972
FRIDAY, MARCH 24, 1972

CASE NO. 41,871

DISTRICT COURT OF APPEAL, FIRST DISTRICT

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Petitioner,

v.

RAYMOND L. McDANIEL, *Respondent.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., Concur.

cc: Hon. Raymond Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk

Messrs. Kurz, Toole, Taylor, Moseley
Messrs. Horton, Schwartz & Perse
and Messrs. Beckham & McAliley
& Gabel

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By /s/ DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida